No. .....

UNITED STATES OF AMERICA,

IN THE SUPREME COURT.

S. OTHO WILSON, *Plaintiff in Error,*

versus

THE STATE OF NORTH CAROLINA AND Z. V. WALSER, ATTORNEY-GENERAL, ON THE RELATION OF JOHN H. PEARSON, *Defendant in Error.*

Respondent's Brief on the Motion to Attach for Contempt.

The respondent respectfully submits that he has not been guilty of contempt of this Honorable Court—

I. Because the judgment of the Supreme Court of North Carolina was in itself self-executing, and needed no writ to enforce it.

The Code of North Carolina, sec. 611, is as follows: "If the judgment be rendered upon the right of the person so alleged to be entitled, and the same be in favor of such person, he shall be entitled, after taking the oath of office and executing such official bond as may be required by law, *to take upon himself the execution of the office;* and it shall be his duty, immediately thereafter, to demand of the defendant in the action all the books and papers in his custody or within his power belonging to the office from which he shall have been excluded."

The judgment of the Superior Court, affirmed by and made the final judgment of the Supreme Court of North Carolina, operated of itself to suspend the plaintiff in error from the office of Railroad Commissioner. There was no vacancy, because it had already been filled by appointment of the Governor under the law—Acts of 1891, ch. 320, sec. 1.

Respondent had already qualified by taking the oath of office immediately upon his appointment, and no bond was required of him.

There was no undue haste, either on the part of the respondent or of the Courts; the policy of the law requires the trial of such cases to be expedited. Code of North Carolina, sec. 616.

In pursuance of this policy, on application of counsel for relator, in open Court, no objection being made thereto (see opinion of Mr. Justice Clark attached to respondent's answer), the Supreme Court rendered final judgment and directed process to issue under section 957 of The Code of North Carolina.

The respondent being already in office by virtue of his appointment and of the judgment, it required no writ to put him in. But the Sheriff, in obedience to the writ, went with respondent upon the porch of the building and to the door of the Commission rooms, and, finding it closed, left him there.

The suspended officers were absent, as respondent swears, to avoid service of the writ; the clerk and janitor were gone, the seal removed, the doors locked.

The respondent had been by the final judgment declared the rightful incumbent, and by the statute directed to take possession.

We submit that, being in the building, if he had had the key, he might have unlocked the door and gone in; he was to all intents and purposes in possession, and the Sheriff's duty was performed immediately after 5.30 p. m., there being no physical opposition to the entry of respondent, requiring the power of the county to overcome it.

This was more than an hour before the filing of the writ of error and bond in the office of the Clerk of the Supreme Court—at 7.10 o'clock on the same day—and it made no difference that respondent did not procure the doors to be opened for some hous later.

Herman on Executions, § 529.
Freeman on Executions, §§ 473, 474.

Relator should be left in quiet possession; here there was no one to remove from the office or rooms. What was more appropriate to be done than for the relator to have quietly sent for a locksmith and had the door opened.

"Where, upon *quo warranto*, there is a judgment that the relator is entitled to the office, and that defendant be ousted and pay costs, and he appeals to the Supreme Court and files a *supersedeas* bond in the form provided by law: Held that from such judgment an appeal will lie, and that the *supersedeas* bond will stay proceedings for the enforcement of the judgment for costs, but does not defer the relator's right to take possession of the office under chapter 6, section 20 of The Code, no process being required to execute the judgment in that respect.

Fawcett *v.* Superior Court, 15 Washington Rep., 342.
S. C. 55 Am. St. Rep., 894.
Joyse *v.* Drorburgh, 63 Iowa, 711.

"Upon a judgment of amotion from office, the party amoved is divested of all official authority and excluded from office so long as the judgment remains in force." (High on Ex. Rem., § 756). And when judgment is rendered in favor of a relator, he needs no writ to invest him with the office. Under section 8639, How. Stat., he is entitled to take upon himself the execution of the office. Can this right be defeated or suspended by suing out a writ of error and giving a bond to stay execution? The statute (secs. 8697,

8681) provides for a stay of execution by suing out a writ of error, but does not authorize a suspension of a judgment which requires no aid from process to give it effect. The practical result of permitting such a writ to suspend the judgmeut in *quo warranto* cases *would in many cases be to defeat the relator of his remedy wholly.* Such a construction is not to be indulged, except it be imperatively required by the terms, which we think is not the case here."

People *ex rel.* Wagenseil *v.* Stephenson, 98 Mich., 218.

"Upon the rendition of a regular judgment of ouster in the suit of the people against a public officer, and in favor of another individual for the office, the officer becomes actually ousted and excluded from office, and the party declared to be entitled, upon taking the official oath and filing his bond (when required), becomes, *eo instanti*, invested with the office and entitled under section 437 of The Code to demand and have the books and papers appertaining to the office."

Welsh *v.* Cook, 7 How. Pr. Rep., 282, especially pages 285–6.

Section 437 of the New York Code is substantially the same as section 611 of the North Carolina Code.

"A judgment suspending an attorney from practice executes itself, except as to the collection of costs, and is not affected by an appeal therefrom to the Supreme Court and obtaining a *supersedeas.*"

Walls *v.* Palmer, 64 Ind., 493.

"Under a statutory provision that 'if judgment be rendered in favor of such claimant he shall proceed to exercise the functions of the office after he has qualified as required by law,' a *supersedeas* bond filed on appeal to the Supreme Court from a judgment in favor of the claimant stays proceedings for the enforcement for costs, but does not defer

the relator's right to take possession of the office, no process being required to execute the judgment in that respect."

Payne on Elections, 852.
Mechem on Pub. Office, sec. 497.

"The judgment requires no aid from process to give it effect. 98 Mich., *supra*. His appeal, in the absence of an express provision of the law to the contrary, did not, and could not, in the very nature of things, affect the judgment; the judgment was not annulled thereby, but it remained in full force and effect. Such seems to be the uniform rulings of all Courts on this question. The authorities cited above seem to be conclusive on these points, and a number of them expressly hold that a *supersedeas* does not lie in a contested election case, and there is not a single authority to the contrary, so far as we can ascertain."

State *ex rel.* Craig *v.* Woodson, 128 Mo., at p. 506.

"Sec. 1007 of the Rev. Stat., which, as amended by the Act of February 18, 1875 (18 Stat., part 3, p. 316), provides that where a writ of error may operate as a *supersedeas*, execution shall not issue until the expiration of ten days after the rendition of the judgment, has reference only to the judgments of the courts of the United States."

Doyle *v.* Wisconsin, 94 U. S., 50.

II. But if it had been necessary that the Sheriff should have gone further in execution of the writ by opening the door, and if the bond filed did not have the effect of a *supersedeas* as contended by the plaintiff in error, we respectfully submit that there can be no contempt without the intent to commit it—in this case to disobey an order of this Court. And respondent swears he did not know of the filing of the bond in the Clerk's office at the time he took possession of the rooms and assumed the office, and not until the next day. And further, that he acted under advice of counsel.

The better, but, as we shall see, not the unanimous opinion, is that on a rule to show cause why a party should not be punished for contempt, the actual intention of the party is material, and if the respondent disavows, upon oath, any intention of committing a contempt, the rule will be discharged.

Rapalge on Contempt, § 121.
In re Moore, 63 N. C., 397.
Re Walker, 82 N. C., 95.
Bond *v.* Bond, 69 N. C., 97.

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